

ORIGINAL

No. 2016-0859

In the Supreme Court of Ohio

APPEAL FROM THE BOARD OF PROFESSIONAL CONDUCT
CASE NO. 2014-085

CLEVELAND METROPOLITAN BAR ASSOCIATION

Relator

v.

KENNETH R. DONCHATZ

Respondent

RESPONDENT KENNETH R. DONCHATZ'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF PROFESSIONAL CONDUCT

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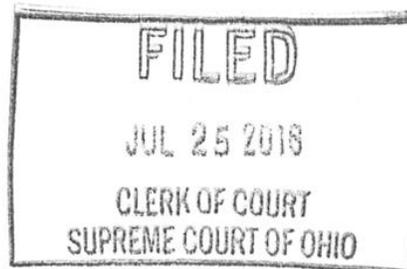


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IN THE SUPREME COURT OF OHIO

CLEVELAND METROPOLITAN BAR ASSOCIATION	:	Case No. 2016-0859
	:	
Relator	:	
	:	
v.	:	
	:	
KENNETH RONALD DONCHATZ	:	
	:	
Respondent	:	

**RESPONDENT'S OBJECTIONS TO THE
RECOMMENDATION OF THE BOARD**

Now comes Respondent, by and through counsel, and hereby Objects to the Report and Recommendation of the Board of Professional Conduct ("Report"). In the Report, the Panel failed to consider mitigation evidence of Respondent's character for honesty and truthfulness when assessing its recommended penalty. Further, the Panel's recommended sanction and findings of misconduct as to Counts Three and Four are against the manifest weight of the evidence that is contained in the record, and the Panel did not properly consider and analyze the evidence admitted into the record. For all of these reasons, the case should be remanded for a proper consideration of the evidence admitted to the record, or alternatively, the recommended penalty should be rejected in favor of a lesser penalty.

I. The Panel Failed to Consider Mitigating Character Evidence

The Panel erred in failing to consider any of the character evidence attesting to Respondent's reputation for honesty and integrity, and highlighting his decades long volunteerism and public service. The respondent offered a large body of character

evidence, all of which was admitted into the record. *See, Exhibit 10.* But the Panel did not consider any of this evidence and did not even mention it in its Report.

Respondent has submitted numerous letters from clients, colleagues, and friends attesting to his high character and generosity in his more than 20 years of law practice. *Id.* Respondent has also given zealously to his community, teaching writing and appellate advocacy at Ohio State University's Law School for 16 years; coaching the moot court team at Denison University for 2 years; coaching the Westerville North High School mock trial team for 20 years; 8 years volunteering on the Clients Security Fund, with 1 year as chairman; chairing the Association for Professional Responsibility for Lawyers' Membership Committee for the past 5 years; among other things. *TT 360:24-366:24.*

Moreover, Respondent has been recognized for his pro-bono services to the legal community, particularly in the realm of legal education. In 2005, Respondent received the "Friend of Education Award" from the Westerville Education Association for his work with the Westerville North High School Mock Trial Team. *Id.* In 2014, Respondent received the Founder's Award from the Ohio Center for Law-Related Education, which is the highest legal education award given in the State of Ohio. The award was presented by Secretary of State John Husted and was based upon Respondent's work with the mock trial team, as well as his pro-bono representation of "Our Community, Our Schools," which advocated for retention of extra-curricular activities such as high school mock trial.

This type of mitigation evidence is important, and it speaks to the essence of the Respondent's character and his service to the Bar and the community. Evidence of this nature cannot be disregarded by the Panel, and it should have been considered in the

Panel's Report. Indeed, there is no precedent that would allow the Panel to disregard character evidence, particularly of the nature and scope of the character evidence presented in this case.

II. The Panel's Decision is Against The Manifest Weight of the Evidence

The legal sufficiency of the evidence and the manifest weight of the evidence are distinct concepts. *Eastely, Admr. V. Volkman, Huffman*, 2012-Ohio-2179. Legal sufficiency is a test of adequacy, meaning that the evidence meets the basic requirements of burden of proof. *Id.* at 11, citing *State v. Thompkins*, 78 Ohio St. 3d 380 (1997). Even if the burden of proof is met, however, the case should nevertheless be judged on the manifest weight of the evidence. *Id.* at 12. In this case, the Panel did not properly weigh the evidence that was admitted into the record. In particular to Counts 3 and 4, the Panel disregarded the greater weight of credible evidence, and instead issued a Report that contains almost no analysis of the evidence. The Report contains almost no analysis or reasoning, and there is no explanation of why Respondent's evidence was disregarded. Respondent respectfully objects to the Panel's conclusions in relation to Count 3 and 4 on the grounds that the manifest weight of the evidence supports the Respondent's position.

a. Count Three: Hampton

Respondent took over as counsel for Carol Jean Hampton in her disciplinary case late in the litigation. *TT 103:25-104:3*. Formal discovery had closed at the time, and stipulations of fact had already been executed. *TT 286:1-4*. Relator possessed copies of two recordings made by counsel for one of the Hampton grievants, JT Holt, for at least a year before Respondent took over as Hampton's counsel in November 2013. *TT 296:16-20*. Relator did not produce the recordings because they had not been

requested in discovery nor did they contain exculpatory evidence. *TT 283:10-284:3*. (Hampton's prior counsel in the grievance had never made a formal discovery request for any such statements or recordings before the discovery deadline closed, and the Panel in that case would not let Respondent conduct discovery.)

The hearing on the Hampton grievance was scheduled for May 6, 2014. *TT 286:10-12*. Respondent produced Hampton and her son, Chris Destocki, for deposition on April 25, 2014. *TT 113:3-5*. Respondent learned that day that Holt had tape-recorded three meetings between Holt, Hampton, the grievant, and Destocki. *TT 111:15-25*. Both Hampton and Destocki testified that Holt tape-recorded the third meeting, which occurred in February 2013, in which the grievant admitted Hampton did not owe any money to grievant. *TT 258:20-259:19*. Relator's counsel, Ms. Osmond produced copies of recordings of the first two meetings later that day, after the depositions concluded. *TT 112:1-9*.

Ms. Osmond and Respondent exchanged emailed communications on April 29, 2014. The two disagreed over whether Relator had an obligation to affirmatively seek exculpatory evidence not in its possession. *TT 283:10-284:3*. Ms. Osmond spoke to Holt, who denied he recorded the third conversation. *TT 266:7-13*. Ms. Osmond admitted at the hearing in this matter that Holt was unlikely to have voluntarily produced an exculpatory recording on a grievance he had filed on behalf of his client. Yet, surprisingly, at the time she spoke to Holt, shortly before the Hampton hearing, she never thought to question his denial. *TT 282:8-14; 295:20-296:15*.

Respondent was placed in the very difficult position of learning only days before the disciplinary hearing that exculpatory evidence was likely available to exonerate his client. Relator took the position that it had no duty to do anything other than ask Holt if

a recording existed. Relator invited Respondent to call Holt. Phone records demonstrate Respondent tried to do so by calling a phone number provided by his client. *TT 122:24-123:2; Respondent's Ex. 3.* Relator also offered Respondent the opportunity to take a perpetuation deposition of Holt, which Respondent did not believe was strategically advantageous to his client, especially given that the offer only came a few days before the hearing. *TT 109:9-14.*

Faced with these facts and the attendant time crunch, Respondent filed Hampton's First Motion in Limine on April 30, 2014. In it, Respondent stated the facts upon which the motion was based:

During discovery, Relator was unable to develop any evidence that Respondent owed the client any other monies. In fact, the only evidence developed in discovery was that (1) any monies beyond the property tax money, if any, were owed by Chris Destocki, and (2) during settlement discussions between Respondent, Destocki, Ms. White and her attorney JT Holt, Ms. White admitted that she had no claims against Respondent. Moreover, JT Holt recorded this conversation, including Ms. White's admission that all of the issues between her and Respondent were fully resolved. However, despite two requests to do so, Relator has not produced this recording, instead taking the position that because Relator does not possess it, Relator does not have to produce it.

Jt. Ex. 16. From these facts, Respondent argued:

But this response implicates Relator's basic duties as a prosecutor and calls into question the fundamental fairness of pursuing charges against Respondent when the prosecutor is *fully aware* that exculpatory evidence exists. Respondent *now knows without a doubt* that a recording exists that contains statement that exonerate the Respondent. These are probative, reliable statements that go to the very heart of the charges set forth in Count Nine. Yet, Relator hides behind a discovery rule rather than making sure that justice is fulfilled in this case.

Id. (emphasis added). In terms of relief, Respondent requested that "the Hearing Panel should exclude evidence related to the aforementioned charges."

Hampton offered her resignation on May 2, 2014. Respondent then received two communications from Scott Drexel questioning the content of the First Motion in Limine. Without the pressure of an impending hearing, Respondent was able to more fully articulate the facts giving rise to the argument made in the motion. In a letter to Mr. Drexel dated June 26, 2014, Respondent stated:

The motion was reasonably based upon the following:

1. The deposition testimony given by Carol Hampton, subject to cross-examination, that the tape recording of the third meeting was made by JT Holt.
2. The deposition testimony given by Chris Destocki, subject to cross-examination, that the tape recording of the third meeting was made by JT Holt.
3. My clients' statements to me that the third meeting had been recorded.
4. JT Holt's proven practice of tape recording meetings with Mrs. Hampton.
5. The existence of JT Holt's recordings of the first two meetings in Relator's files, which were not provided to my predecessor or to me until April 29, 2014, approximately two years after the investigation of Mrs. Hampton was first opened and only after those recordings were the subject of sworn testimony by two witnesses.

Relator's Ex. 19. Respondent argued, based on these facts, that no "reasonable person" could conclude that Holt did not record the third conversation. *Id.*

At the hearing in this matter, Ms. Osmond agreed with four of the five bases for Respondent's conclusion, as set forth in his June 20, 2014, letter. However, she could not speak to what Hampton had told Respondent (Point 3). *TT 288:12-291:5.*

The line between zealous advocacy, based on First Amendment protections, and sanctionable conduct is often difficult to discern. See, e.g., Smolla, *Regulating the Speech of Judges and Lawyer: The First Amendment and the Soul of the Profession*, 66 Fla.L.Rev. 3 (2014). Likewise, the line between a statement of opinion, which is

generally not actionable, and a knowingly false statement, is murky. *Berry v. Schmitt*, 688 F.3d 290, 303 (6th Cir. 2013).

In *Berry*, the Sixth Circuit articulated a test for determining when an opinion crosses the line:

An opinion relies on implied facts where a speaker utters an opinion without providing the underlying factual basis * * * [A] statement based on fully disclosed facts is only actionable **where the facts are themselves false and demeaning** * * * The rationale for this dichotomy is that when facts are merely implied, a listener is unable to assess the basis for that opinion. Where the underlying facts are fully revealed, however, readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts.

Berry, 688 F.3d at 303-304 (emphasis added, internal citations and punctuation omitted).

Respondent's insistence that the third meeting was recorded can be seen only as his opinion and/or argument, based on the facts he articulated in the motion and, more fully, in the letter to Mr. Drexel. His statements at issue begin with the qualifiers "fully aware" and "now knows without a doubt," which should have alerted any reader that he is stating his opinion/argument based on the facts stated in the motion's immediately preceding paragraph. In fact, Respondent could not have known whether Ms. Osmond was fully aware of the third recording or not. He was arguing that under the circumstances, a logical conclusion was that she was aware of and must now know of the existence of the third recording because he was present when she learned about it. Because he disclosed the facts on which his opinion is based, Respondent cannot be sanctioned for his opinion/argument.

Respondent's motion and letter must also be viewed in the context of another disciplinary case, in which he served as counsel for Respondent Scott Smith—a battle he

was fighting at the same time as the Hampton case. *See Disciplinary Counsel v. Smith*, 143 Ohio St. 3d 325, 2015-Ohio-1304, 37 N.E.3d 1192.

In *Smith*, the hearing panel issued a report finding that Smith violated various disciplinary rules based on his billing practices, and the board adopted the panel's recommendation that Smith be indefinitely suspended from the practice of law. Smith objected to the findings, arguing, in part, that his defense to the claims was that his clients had asked for, and approved, his billing practices for strategic reasons, but he was denied the right to obtain client documents from the clients and his old firm that would have exonerated him. The Supreme Court agreed and remanded the case, stating:

Given the nature of Smith's longstanding and consistent defense of the charges against him, we are alarmed by the conspicuous absence of documentary or testimonial evidence regarding the absence of documentary or testimonial evidence regarding the actual content of the online databases with respect to the five cases at issue—evidence that in all probability would serve to either confirm or discredit Smith's claims.

Smith, 143 Ohio St. 3d 325, 2015-Ohio-1304, 37 N.E.3d 1192, ¶ 14.

Respondent testified that his perception of the actions of the Office of Disciplinary Counsel in the *Hampton* case was colored by his experience with Relator in the *Smith* case. And Respondent acknowledges that his advocacy in the Hampton case came during a great urgency of time and the very late disclosure of potentially exonerating evidence, but he respectfully submits that his articulation of the facts giving rise to his opinion makes his statements advocacy, not a statement of fact.

Thus, Respondent respectfully objects to the Panel's conclusions that misconduct occurred in the Hampton case. Respondent's motion was reasonably based upon discernable facts, most of which Ms. Osmond admitted were true (Ms. Osmond

admitted to all of the facts except for the conversation between Ms. Hampton and Respondent, which she was not a part of). The Panel itself did not make a finding that any of those facts were false and did not set forth any analysis at all regarding the truth or falsity of those facts. Instead, the Panel based its recommendation solely on the statement that Karen Osmond “felt” like the allegations were false, rather than properly analyzing the evidence regarding the truth of each fact that supported Respondent’s argument as required by *Berry*. Finally, Respondent’s advocacy and opinions are protected under the First Amendment and the Sixth Circuit’s *Berry* case. Surely, the First Amendment protects the Respondent’s ability to advocate for his clients, particularly when no evidence is presented to show that the underlying facts upon which he relied were false. Therefore, Respondent respectfully requests that this Court be dismissed or remanded back the Panel for the proper consideration of the manifest weight of the evidence.

b. **Count Four: McKibben**

The actions Respondent took with regard to this count were at all times guided by Magistrate Harilstad (the “Magistrate”) of the Franklin County Court of Common Pleas, who was presiding over a case Respondent filed to collect over \$120,000 in legal fees from Leader Technologies Incorporated and its founder, Michael McKibben. Magistrate Harilstad was assigned to preside over several days of mediation in an attempt to settle the case. Respondent testified that the Magistrate instructed him to prepare a consent judgment with regard to an issue as to the amount in controversy in the case on which the parties agreed was settled. *TT 84:12-21*. Respondent consulted with his attorney in the case, Rick Brunner, who prepared a draft of a Stipulated Entry and Consent

Judgment (the “Consent Judgment”) and forwarded it to Respondent. *Respondent’s Ex. 4.*

Respondent then circulated drafts of the Consent Judgment by email to all parties on April 5, 2012, the first of which stated: “Attached is the consent judgment that the Magistrate asked me to draft. Please let me know if you have any edits.” *Respondent’s Ex. 5.* Mr. McKibben acknowledged receipt of the draft Consent Judgment and argued several points, but neither he nor Mr. Storey told Respondent that he had misinterpreted the Magistrate’s request. *Jt. Ex. 17.* Nor did they circulate their own draft of the Consent Judgment.

The next day, April 6, 2012, Respondent forwarded the draft Consent Judgment to the Magistrate, copying all parties, stating “Finally, I am attaching the Consent Judgment that was circulated earlier this week, as you asked me to do on Monday.” *Jt. Ex. 17, p. 2.* Notably, Respondent did not file the Consent Judgment with the Clerk of Courts, rather he simply emailed it to the Magistrate for review. The Magistrate did not write back and tell Respondent that he had not asked Respondent to do any such thing, nor did either of the two defendants. No one commented on the form of the draft or suggested any changes or edits. *TT. P. 87.*

Respondent electronically submitted the Consent Judgment to the Court a few weeks later as a proposed judgment entry. *Respondent’s Ex. 6.* The signature lines for the defendants stated only that the draft had been circulated to defense counsel. *Jt. Ex. 19.* Judge Bessey signed the Consent Judgment on April 27, 2012, which ignited the firestorm that ensued. *Id.*

The Magistrate was copied on several emails between the parties over the next few days. *Jt. Ex. 20.* Again, Respondent stated in one such email—sent on April 30,

2012, at 2:08 p.m. to the Magistrate and all parties—that he had prepared and circulated the Consent Judgment “pursuant to the Magistrate’s instructions at our last mediation meeting.” *Id.*, 4th page of exhibit. Respondent then explained everything he had done and the order in which he performed the tasks. Respondent again asked the Magistrate to clarify his instruction if Respondent had misinterpreted them, but the Magistrate never replied. At no time did the Magistrate indicate that Respondent had done anything other than follow his instructions. *TT 87 and 94.*

Just like attorneys, judicial officers have an obligation to report unethical conduct by attorneys. The Magistrate never reported Respondent’s behavior, and there is no dispute that the Magistrate never wrote back and stated that Respondent had acted wrongly, mistakenly, unprofessionally, unethically or dishonestly. *Id.* Mr. McKibben requested sanctions against Respondent in his Motion to Object to Consent Judgment, based on the same conduct at issue here, but Judge Bessey did not award sanctions in his order vacating the Consent Judgment. *Jt. Exs. 21, 23.* Neither Magistrate Harilstad or Judge Bessey offered any evidence in this case or took the position that Respondent had done anything wrong.

Mr. Storey’s after-the-fact recollection of what the Magistrate asked Respondent to prepare is not credible. According to his version of events, the Magistrate asked Respondent only to “put his settlement demand in writing, because otherwise it was just ‘mush.’” *TT 229:20-230:13.* Had that been the case, Mr. Storey would have called out the impropriety of the draft Consent Judgment on April 6, when Respondent forwarded it to the Magistrate. But he did not. *TT 89, ll 7-8.* In fact, Mr. Story actually confirmed the dollar amount at issue. *TT 309, ll 19-25.*

Moreover, the Panel improperly disregarded the testimony of Attorney Rick Brunner, who, along with his wife Jennifer Brunner, served as Respondent's counsel in the underlying case and eventually took over the case. *TT 84-85; Joint Exhibit 18.* Attorney Brunner testified that the process Respondent followed in circulating the draft consent judgment, submitting it to the Magistrate and then filing it a few weeks later, was customary under the local rules. Moreover, Attorney Brunner clearly testified that he provided Respondent with legal counsel in drafting and handling the draft consent order. Thus, Attorney Brunner fully supported Respondent's position that he sought advice of counsel before taking any action with regard to the draft consent order. This is important evidence because it shows that Respondent did not act on his own but sought the advice of trial attorney who has been practicing law in Franklin County for over 30 years. Attorney Brunner's testimony proves that Respondent only acted pursuant to his counsel's advice. Attorney Brunner's uncontested testimony was that all of Respondent's actions were taken in accordance with the local rules and the custom and practices of attorneys practicing in Franklin County. *TT 311-312.* No one refuted this testimony.

But the Panel disregarded this testimony. And, furthermore, the Panel did not explain why they disregarded this testimony. What is most troubling about the Panel's Report is that there is not mention whatsoever of Attorney Brunner's testimony, and no mention at all that Respondent was at all times acting pursuant to his counsel's advice and guidance. *TT 309, 7-11 and 310-311.* These are critical facts in analyzing whether a "willful" violation of the Rules of Professional Conduct occurred, and the Panel should have given greater weight to Attorney Brunner's testimony. The Panel should have found that there was not a violation of the Rules because Respondent was acting pursuant to the advice of counsel and therefore did not willfully violate the Rules.

Thus, Respondent respectfully Objects to the Panel's findings of fact and conclusions of law with regard to this Count as they against the manifest weight of the evidence. This Count should accordingly be dismissed or remanded back to the Panel for a proper consideration of the evidence that is contained in the record.

CONCLUSION

Respondent admits he violated the Rules of Professional Conduct in Counts 1 and 2. Respondent respectfully submits that the Panel erred in its conclusion regarding Count 3 and 4, and those conclusion are against the manifest weight of the evidence. Further, the Panel failed to consider the mitigation evidence of Respondent's character for honesty and truthfulness, and did not give any weight to Respondent's more than 20 year history of pro-bono public service. If the evidence were properly weighed and all of the mitigation evidence properly considered, Respondent respectfully submit that his transgressions do not warrant actual time away from the practice of law. Respondent therefore requests that any sanction be stayed on condition of no further violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following via email, per
S.Ct.Prac.R. 3.11(C), this 25th day of July 2016:

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APPENDIX A

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In re:

Case No. 2014-085

Complaint against:

Kenneth R. Donchatz
Attorney Reg. No. 0062221

Respondent

Cleveland Metropolitan Bar Association

Relator

**Findings of Fact,
Conclusions of Law, and
Recommendation to the
Board of Professional Conduct of
the Supreme Court of Ohio**

OVERVIEW

{¶1} This matter was heard on October 7 and 8, 2015 in Columbus before a panel consisting of Keith A. Sommer, Roger S. Gates, and Robert B. Fitzgerald, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing, represented by George D. Jonson. Robert J. Hanna and Sarah L. Bunce appeared on behalf of Relator.

{¶3} On October 31, 2014, Relator filed a two-count complaint alleging several violations of the Ohio Rules of Professional Conduct regarding Respondent's misconduct during the Davey Tree litigation when he failed to correct a false statement and personally filed a satisfaction of judgment taken against him even though he had not paid the judgment; the representation of Lin Cracknell by failing to clearly set forth the scope and nature of his representation of the fee agreement and accepting \$100,000 loan from the Cracknells. Respondent filed an answer on December 18, 2014.

{¶4} On March 23, 2015, Relator filed an amended four-count complaint against

Respondent alleging misconduct regarding Respondent's misconduct during the Davey Tree litigation; the representation of Lin Cracknell; accepting a \$100,000 loan; representation of Carol Hampton when he filed a motion in limine that contained false statements and misrepresentations; and the representation of Michael McKibben and Leader Technologies when he filed an improper "Stipulated Entry and Consent of Judgment" and then refused to withdraw the entry after he had been asked to do so. Respondent filed an answer to the amended complaint on April 10, 2015.

{¶5} The amended complaint alleged violations of the following Rules of Professional Conduct: Prof. Cond. R. 1.5(b); Prof. Cond. R. 1.8(a); Prof. Cond. R. 3.1; Prof. Cond. R. 3.3(a)(1); Prof. Cond. R. 3.4(c); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d).

{¶6} For the reasons set forth below, the panel finds that Respondent engaged in professional misconduct and recommends that Respondent be suspended from the practice of law for two years, with six months stayed on the condition of no further misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶7} Respondent was admitted to the practice of law in the state of Ohio on November 8, 1993 and was admitted to the United States District Court the same year. Respondent is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶8} Respondent attended Rutgers University and Ohio State University. Hearing Tr. 360. After graduation, Respondent obtained a position as an assistant attorney general at the Ohio Attorney General's office and was employed by the Ohio Disciplinary Counsel's office from 1998 to 2001. *Id.* Thereafter, Respondent practiced law with the firm of Fuller & Henry from 2001 to 2004. Respondent then went into private practice. *Id.*

{¶9} Respondent is currently a sole practitioner. Respondent's website indicates that he is a legal ethicist, practicing in the areas of law that include legal ethics, professional responsibility,

and complex commercial litigation. Respondent, at the time of the hearing, practiced out of his own firm referred to as Donchatz Law.

{¶10} For each of the four counts alleged against Respondent, Relator demonstrated at the hearing, through clear and convincing evidence, that Respondent's conduct violated the Rules of Professional Conduct referenced below.

Count One—Davey Tree Litigation

{¶11} The stipulations and hearing testimony of Respondent and Kevin String show that Respondent violated the following rules: Prof. Cond. R. 3.1 [meritorious claims and contentions]; Prof. Cond. R. 3.3(a)(1) [knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal]; Prof. Cond. R. 3.4(c) [knowingly disobeying an obligation under the rules of a tribunal]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]. Respondent committed these violation by: (1) filing an unsupported satisfaction of judgment; (2) failing to withdraw the satisfaction of judgment after confirmation that it was improper; (3) filing a frivolous and unsupported motion to reconsider the default judgment; and (4) failing to pay the default judgment entered against him.

{¶12} This matter involved a judgment that was personally taken against Respondent for unpaid invoices from Davey Tree. Respondent represented himself in the matter. Davey Tree had obtained default judgment against Respondent. Sometime later, Respondent filed a notice of satisfaction of judgment without authority or proper notice to Davey Tree. More importantly, he had failed to pay the judgment. Davey Tree, through its attorney, alerted Respondent that the notice was improper. Upon receipt of that notice, Respondent failed to correct the false statement with the court. Davey Tree was forced to file a motion to have the satisfaction of judgment vacated.

The court did vacate the satisfaction notice and reinstated the judgment. At that time, Respondent still failed to pay the judgment. Instead, he filed a Civil Rule 60(B) motion to reconsider the default judgment that had been entered three years earlier, on January 25, 2010. The trial court denied the motion to set aside the default judgment and awarded Davey Tree sanctions. Not until after that, did Respondent decide to pay the judgment.

{¶13} Respondent never confirmed that the default judgment entered against him in 2010 had been paid before filing a satisfaction of judgment in February 2012. Still, he filed it. Hearing Tr. 52-53.

{¶14} Respondent claims to have written a personal check “wrapped” it in a garnishment notice, and mailed it to counsel for Davey Tree. However, he never confirmed that it was received or cashed before filing the satisfaction of judgment. *Id.* 42-43; 48-51.

{¶15} Following the filing of the satisfaction of judgment, Kevin String, counsel for Davey Tree, contacted Respondent regarding the improper filing of the satisfaction of judgment. String (and the panel) found it troubling that a lawyer would have filed, as the defendant, a satisfaction of judgment when it was the plaintiff’s judgment. *Id.* 174-176; Joint Ex. 4.

{¶16} When confronted by String regarding the impropriety of filing the satisfaction of judgment, Respondent went on the offensive indicating that he had considered filing sanctions against String for his use of Cleveland Municipal Court for the garnishment action, an entirely proper course of action for String to have taken. *Id.* 167, 182; Joint Ex. 3.

{¶17} Only after the satisfaction of judgment had been filed, did Respondent confirm that the judgment had not been paid. *Id.* 58. Respondent did not withdraw the satisfaction of judgment *Id.* 58-59. String had to file a motion to vacate to have the improperly filed satisfaction of judgment withdrawn. *Id.* 184; Joint Ex. 5. After the court granted the motion to vacate and reinstated the

judgment, Respondent still did not pay the judgment. *Id.* 61. More than three years after the default judgment had been entered, and more than 18 months after the judgment had been reinstated, Respondent filed a motion to reconsider the default judgment. *Id.* 70-72; Joint Ex. 6.

{¶18} Davey Tree, through String, was forced to respond to yet another inappropriate filing from Respondent. *Id.* 74, 189-190; Joint Ex. 7. The court denied the motion to reconsider and awarded sanctions to Davey Tree. The trial court held that the filing of the motion had been frivolous and without merit. *Id.* 192; Joint Ex. 8. Due to his actions, the trial court ordered Respondent to pay Davey Tree and to pay String's attorney fees.

Count Two—Representation of Lin Cracknell and Acceptance of Loan

{¶19} The admitted exhibits and testimony of record from Respondent and Lin Cracknell demonstrate that Respondent violated the following rules: Prof. Cond. R. 1.5(b) [fees and expenses for which the client will be responsible shall be communicated to the client, preferably in writing]; and Prof. Cond. R. 1.8(a) [a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client]. Respondent violated these rules by: (1) failing to clearly set forth the scope and nature of his representation or the fee arrangement to Cracknell; and (2) accepting a \$100,000 loan from Cracknell, but failing to satisfy the requirements of business transactions between attorneys and clients.

{¶20} Respondent was in a firm that had broken up. As a result, there were some taxes that had to be paid, and he needed to obtain a loan from a financial institution to pay the taxes. Respondent had inquired of his clients, the Cracknells about a banker. They offered to loan him the money. In fact, they did loan him \$100,000. At the time, Respondent was representing Cracknell. With respect to the fee arrangement for Respondent's representation of Cracknell, the

testimony revealed that Respondent had said that he was going to provide the representation for free.

{¶21} Cracknell never received anything in writing from Respondent regarding the terms of such a fee arrangement for his representation. Cracknell Depo. 11.

{¶22} Respondent began representing the Cracknell's in early 2007. Hearing Tr. 127. However, there was no written agreement for the representation. Apparently, there was also no discussion at the beginning of the attorney-client relationship regarding what the payments to Respondent would be. When Cracknell would ask Respondent about payment, he would respond, "Don't worry about it." Cracknell Depo. 10-12.

{¶23} Respondent claimed that he told Cracknell that the representation would be pro bono, but in May 2013, he suggested that she file a claim in fee arbitration because he had asked her "before how the legal fees were going to be handled" and he did not want to be left "holding the bag on legal fees." Hearing Tr. 144-146; Relator's Ex. 26.

{¶24} On September 17, 2009, Respondent borrowed \$100,000 from Cracknell. Cracknell Depo. 29-30. At the time, there was an attorney-client relationship with Cracknell. Hearing Tr. 127. During his representation of Cracknell, the Cracknell's gifted Respondent with an antique desk. Respondent refurbished and restored that desk.

{¶25} According to Cracknell, Respondent never put in writing for her that: (1) there were special rules governing transactions between a lawyer and a client; (2) there were potential conflicts of interest between a lawyer and a client; or (3) she should seek independent counsel before making the loan. Cracknell Depo. 22-23. Additionally, Respondent never provided Cracknell with a promissory note setting forth the terms of the loan. *Id.* 40.

{¶26} Respondent admitted that he accepted the check from Cracknell without having the

writings required by Prof. Cond. R 1.8(a). Hearing Tr. 138, 374-375. Upon questioning from the panel, Respondent admitted that “the minute he took the loan” from Cracknell he had violated Prof. Cond. R. 1.8(a). *Id.* 391. Ultimately, Respondent only repaid the Cracknell’s \$57,000. Additionally, Respondent did return the restored antique desk to the Cracknell’s. Hearing Tr. 150-152; Joint Ex. 13.

Count Three—Representation of Carol Hampton

{¶27} The stipulations and hearing testimony of Respondent and Karen Osmond establish that Respondent violated the following rules: Prof. Cond. R. 3.1; Prof. Cond. R. 3.3(a)(1); Prof. Cond. R. 3.4(c); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d) in filing a motion in limine that contained false statements and misrepresentations. Later, Respondent stood by those statements when questioned about them after his representation of Hampton had ended. The evidence introduced showed that Respondent represented attorney Carol Hampton in a disciplinary proceeding. Hearing Tr. 103.

{¶28} During the course of discovery of the Hampton disciplinary proceeding, Carol Hampton and her son, Chris Destocki, testified to tape-recorded conversations with Attorney J.T. Holt regarding Hampton. *Id.* 110, 258-259.

{¶29} Following the depositions, at Respondent’s request, Karen Osmond, Assistant Disciplinary Counsel assigned to the Hampton matter, provided Respondent copies of two tape recordings, but informed him that she did not have a tape recording for a third meeting. *Id.* 260-262; Joint Ex. 14.

{¶30} After Respondent requested, for a second time, a copy of the third recording, Osmond contacted Holt and confirmed there was no recording of the third meeting. *Id.* 266. Osmond told Respondent that Holt had not recorded the third meeting and provided him with

Holt's phone number, inviting Respondent to speak directly with Holt to verify the information.

Id. 265; Joint Ex. 15.

{¶31} The day after being informed that a tape of the third meeting did not exist, Respondent filed a motion in limine which stated, in part:

However, despite two requests to do so, Relator has not produced this recording, instead taking the position that because Relator does not possess it, Relator does not have to produce it. But this response implicates Relator's basic duties as a prosecutor and calls into question the fundamental fairness of pursuing charges against Respondent when the prosecutor is fully aware that exculpatory evidence exists. Respondent now knows without a doubt that a recording exists that contains statement that exonerate the Respondent * * *. Yet, Relator hides behind a discovery rule rather than making sure that justice is fulfilled in this case.

Id. 272; Joint Ex. 16.

{¶32} The motion did not mention that: (1) Osmond had performed an investigation regarding a third tape recording; (2) she had informed Respondent that the tape did not exist; and (3) Respondent had been given the opportunity to investigate for himself whether the tape existed.

Id. 274.

{¶33} Osmond viewed the statements about her conduct in the motion as "just false." *Id.* 272, 281. Based upon that, Scott Drexel wrote a letter to Respondent seeking clarification of the statement he had made in the motion in limine. In response, Respondent defended the statements he had made in the motion even though they were not true. *Id.* 111-124; Relator's Ex. 19.

Count Four—Representation of Michael McKibben and Leader Technologies

{¶34} The stipulations and hearing testimony of Respondent and Robert Storey demonstrate that Respondent violated the following rules: Prof. Cond. R. 3.1; Prof. Cond. R. 3.3(a)(1); Prof. Cond. R. 3.4(c); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d) in filing an improper “Stipulated Entry and Consent of Judgment” in the *Recovery Funding, LLC v. Leader Technologies* matter and then failing to withdraw it after being asked to.

{¶35} In the McKibben/Leader Technologies matter, the evidence showed that Respondent represented Recovery Funding, LLC in a matter adverse to McKibben and Leader Technologies. Hearing Tr. 78.

{¶36} At the time the lawsuit was filed, there was no dispute regarding the amount of attorney fees owed by McKibben and Leader Technologies. *Id.* 79, 210-211.

{¶37} The parties engaged in mediation discussions with Magistrate Harilstadt serving as mediator, but were unable to resolve all issues. *Id.* 81-82.

{¶38} In early April 2012, Respondent circulated a draft “Stipulated Entry and Consent Judgment” that he testified was requested by the mediator—the magistrate. *Id.* 85-86; Joint Ex. 18.

{¶39} Robert Storey, counsel for Leader Technologies, testified that the magistrate had not requested a consent judgment be drafted; instead the magistrate had simply asked Respondent to “put [his proposal] in writing.” *Id.* 214. Defendants did not consent to the draft consent judgment. *Id.* 216.

{¶40} However, without the consent of the parties and without direction from the magistrate to do so, Respondent submitted the “Stipulated Entry and Consent Judgment” to the court. *Id.* 87-89.

{¶41} The parties had no notice that Respondent had submitted the stipulated entry. The “Stipulated Entry and Consent Judgment” did not indicate that it was a draft or proposed judgment. Nor did it mention that there were unresolved issues still pending. *Id.* 216; Joint Ex. 19.

{¶42} Following the filing of the entry, McKibben and Storey contacted Respondent informing him that the filed judgment was not proper and requested that he withdraw it. *Id.* 94-96, 217.

{¶43} Storey wrote to that if Respondent did not withdraw the judgment, he would be left with “no recourse but to institute disciplinary action,” because of the dishonesty involved in Respondent’s conduct. *Id.* 224-225. In response, Respondent threatened Storey with an action for frivolous conduct and alleged that Storey had “commit[ted] fraud upon the court” and had defam[ed] opposing counsel.” Relator’s Ex. 4.

{¶44} Respondent did not withdraw the “Stipulated Entry and Consent Judgment,” arguing instead that the judgment was proper under Local Rule 25.01. *Id.* 95, 101. Local Rule 25:01; however, applies only to those cases in which “a decision, order, decree, or judgment is rendered.” *Id.* 222; Joint Ex. 24.

{¶45} McKibben filed an objection to the “Stipulated Entry and Consent Judgment,” asking that it be withdrawn. Respondent filed an opposition arguing the “Stipulated Entry and Consent Judgment” was proper. *Id.* 96; Joint Ex. 22.

{¶46} The court vacated the “Stipulated Entry and Consent Judgment,” holding that there had been no settlement agreement between the parties. *Id.* 98; Joint Ex. 23.

{¶47} All of Respondent’s exhibits were admitted into evidence. Additionally, all of the Relator’s exhibits, except for Ex. 36, 37, and 39 were accepted and admitted into evidence. It is clear that based upon the testimony of Respondent, Attorney Kevin L. String, Attorney Robert

Storey, Attorney Karen Osmond, and Attorney Rick Brunner, Relator has proven by clear and convincing evidence that Respondent has violated the following Rules of Professional Conduct: Prof. Cond. R. 1.5(b); Prof. Cond. R. 1.8(a); Prof. Cond. R. 3.1; Prof. Cond. R. 3.3(a)(1); Prof. Cond. R. 3.4(c); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d).

MITIGATION, AGGRAVATION, AND SANCTION

Mitigating Factors

{¶48} Respondent had not been previously disciplined. The panel also noted that the Franklin County Municipal Court did sanction Respondent by ordering to pay attorney fees to Davey Tree's attorney.

Aggravating Factors

{¶49} This panel notes that Respondent never conceded any wrongdoing. His counsel, during closing arguments, conceded several rule violations. Hearing Tr. 446, *et seq.* The failure on the part of Respondent, personally, to admit any wrongdoing underscored his refusal to accept any responsibility. Further, the evidence, through stipulations and in the hearing showed that Respondent repeatedly and intentionally failed to remove filings that were designed to gain him personal advantage. As a result, the panel finds a selfish motive on the part of Respondent as well as the commission of multiple offenses.

Recommended Sanction

{¶50} "The primary purpose of the disciplinary process is to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship and to allow [the Supreme Court] to ascertain the lawyer's fitness to practice law." *Disciplinary Counsel v. Sabroff*, 123 Ohio St.3d 182, 2009-Ohio-4205. Based upon the evidence in the record, the panel concludes that Respondent's repeated pattern of misconduct calls into question whether

Respondent is worthy of the public's trust and confidence that is essential to the attorney-client relationship and his fitness to practice.

{¶51} Relator and Respondent entered into agreements regarding many of the exhibits as well as acknowledging the mitigating and aggravating factors. They did not agree on an appropriate sanction. Relator requested that Respondent be suspended indefinitely. Respondent requested that any sanction be stayed on the condition of no further violations. There is no question that Respondent engaged in misconduct in several different scenarios that resulted in damage to his clients and to his profession.

{¶52} The Supreme Court of Ohio has held that it "will not allow attorneys who lie to courts to continue to practicing law without interruption." *Cleveland Bar Assn. v. Herzog*, 87 Ohio St.3d 215, 217, 1999-Ohio-30, citing *Toledo Bar Assn. v. Batt*, 78 Ohio St.3d 189, 192, 1997-Ohio-222. As the Supreme Court stated in *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 190, 1995-Ohio-261:

A lawyer who engages in a material misrepresentation to a court * * * violates, at a minimum, the lawyer's oath of office that he or she will not 'knowingly, employ * * * any deception, falsehood, fraud.' Such conduct strikes at the very core of a lawyer's relationship with the court and with the client. Respect for our profession is diminished with every deceitful act of a lawyer. We cannot expect citizens to trust that lawyers are honest if we have not sanctioned those who are not.

{¶53} When an attorney engages in conduct that is determined to violate a rule prohibiting dishonesty, fraud, deceit, or misrepresentation, the attorney will be "actually suspended from the practice of law for an appropriate period of time." *Id.* at 190.

{¶54} The Supreme Court has indefinitely suspended attorneys for violations similar to those of Respondent. For example, in *Disciplinary Counsel v. Frost*, 122 Ohio St.3d 219, 2009-Ohio-2870, ¶37 the Court found indefinite suspension an appropriate sanction where the respondent "committed acts of dishonesty, engaged in a pattern of misconduct, committed multiple

offenses, and * * * failed to acknowledge the wrongfulness of [the] conduct.” See also *Columbus Bar Assn. v. Squeo*, 133 Ohio St.3d 536, 2012-Ohio-5004, ¶17 (indefinite suspension for engaging in a pattern of dishonest conduct with selfish or dishonest motives).

{¶55} The Supreme Court also found an indefinite suspension appropriate in *Columbus Bar Assn. v. Cooke*, 111 Ohio St.3d 290, 2006-Ohio-5709, where “[t]he board cited respondent’s dishonesty as the most troubling aspect of the case.” *Id.* at ¶28. In *Cooke*, the Board had noted the respondent lacked “the basic ability to distinguish the truth, especially when it does not serve his personal interests.” *Id.* In imposing an indefinite suspension, the Supreme Court emphasized “[t]here is simply no place in the legal profession for those who are unwilling or unable to be honest with clients, the courts, and their colleagues. *Id.* at ¶32.

{¶56} Likewise, in *Cleveland Metro. Bar Assn. v. Wrentmore*, 138 Ohio St.3d 16, 2013-Ohio-5041, the Supreme Court adopted an indefinite suspension as an appropriate sanction where the respondent’s “explanation lacks credibility, and his self-serving statements and misrepresentations are indicative of a calculated attempt to avoid accepting responsibility for his misconduct.” *Id.* at ¶23.

{¶57} In response to each of the four grievances, Respondent offered explanations that lacked credibility. Of greater concern, his responses call into question his character and integrity as a lawyer.

{¶58} In the Davey Tree matter, Respondent claims to have written a personal check and “wrapped” it in the garnishment notice to pay the judgment in the Davey Tree matter, but never informed counsel for Davey Tree that he had done so.

{¶59} Respondent offered three explanations as to why the Davey Tree judgment was satisfied: (1) he wrote a personal check wrapped in the garnishment notice and delivered to counsel

for Davey Tree; (2) the docket showed a garnishment of over \$4,000; and (3) the insurance company for the drywall company said it would pay.

{¶60} In the Cracknell matter, Respondent claims to have communicated that his representation was pro bono, but later suggested Cracknell should take their fee dispute to fee arbitration, so that a third party could tell her it was pro bono, because he did not want to be left “holding the bag” on the legal fees.

{¶61} Also in Cracknell, Respondent claims to have sent Cracknell an email explaining to her the “special rules” related to loan transactions with clients, but his answer to Relator’s amended complaint admits there was no writing. Nor did his prior attorney, Mr. Alkire ever make mention of this email about special rules in his response to the grievance.

{¶62} In the McKibben matter, Respondent claims that a judgment entry terminating the case was not the outcome that he had wanted. However, he never informed the court of this. Instead, Respondent opposed McKibben’s attempt to have the judgment set aside.

{¶63} Respondent claims that he could not modify the “Stipulated Entry and Consent Judgment” without recirculating it for defendants’ consideration, yet the version circulated to defendants did not include “submitted for approval” as it did in the version filed with the court.

{¶64} In each case, Respondent had an easy explanation for his conduct. Such responses were an attempt to avoid accepting responsibility for his misconduct.

{¶65} The panel finds two cases, particularly appropriate for review.

{¶66} In *Disciplinary Counsel v. Shaw*, 126 Ohio St.3d 494, 2010-Ohio-4412, the Supreme Court imposed a two-year suspension, with one year stayed. In representing an elderly client, Shaw committed several violations of the Rules of Professional Conduct. First, Shaw named his own children as the beneficiaries of the client’s revocable living trust, even though the

client was not related to him by blood and he had not advised his client of the inherent conflict of interest created by this provision. Moreover, he never suggested that the client obtain advice from a disinterested person or have another attorney prepare the trust documents. Shaw violated DR 1-102(A)(5), DR 1-102(A)(6), DR 5-101(A)(1), and DR 5-101(A)(2).

{¶67} Second, Shaw obtained a loan from the same client to be used as a down payment for a building to house his law practice. Shaw did not advise the client to seek independent advice before making the loan, did not advise her of the risk in making an unsecured loan, and did not discuss the inherent conflict of interest in the loan arrangement. Shaw failed to repay the loan as agreed. Shaw's conduct was found to violate DR 1-102(A)(5), DR 1-102(A)(6), DR 5-101(A)(1), and DR 5-104(A).

{¶68} In an unrelated matter, Shaw obtained fees from his clients in a guardianship case without first obtaining the probate court's approval, and then sought additional fees from the probate court. After the probate court discovered he had already been paid by the client, the court ordered Shaw to reimburse the money paid in excess of the fees approved by the court. Shaw failed to comply with this order, thereby violating Prof. Cond. R. 3.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h).

{¶69} Shaw was found to have engaged in a pattern of misconduct with multiple offenses with resulting harm to vulnerable clients, and that he failed to make restitution. In mitigation, the Board found only that Shaw had no prior disciplinary record in 30 years of practice. Shaw received a two-year suspension, with one year stayed.

{¶70} In *Disciplinary Counsel v. Dettinger*, 121 Ohio St.3d 400, 2009-Ohio-1429, the respondent had borrowed \$25,000 from a long time client and friend. Unlike Respondent in this case, Dettinger paid off of the loan principal to the executor, but long after it was due and without

any interest. Dettinger received a six-month suspension all stayed.

{¶71} In the present case, Respondent characterizes himself as an expert in ethics. In fact, he has used the moniker “the ethics monster.” Relator’s Ex. 41. Respondent’s counsel urged the panel not to hold Respondent to a higher standard because he was a former Assistant Disciplinary Counsel. However, in light of the fact that Respondent uses his prior employment for marketing, suggests that Respondent wants to have it both ways.

{¶72} In this case, Respondent twice filed false documents in court and refused to voluntarily withdraw them when confronted by opposing counsel. Respondent lied about his fee arrangements with Cracknell and was not forthcoming in his testimony about the loan. Finally, Respondent made (and then defended) disparaging comments about opposing counsel’s performance of her duties “without a reasonable factual basis for making the statements.” See, *Disciplinary Counsel v. Marshall*, 142 Ohio St.3d 1, 13, 2014-Ohio-4815, ¶59 (false statements concerning the integrity of a judicial officer).

{¶73} The panel also found helpful the Supreme Court’s following statement explaining its imposition of an indefinite suspension in its decision in *Columbus Bar Assn. v. Cooke*, 111 Ohio St.3d 290, 295-96, 2006-Ohio-5709, ¶32:

Many of respondent’s ethical lapses are very serious in and of themselves. Collectively, they justify the sanction that the board has recommended. There is simply no place in the legal profession for those who are unwilling or unable to be honest with clients, the courts, and their colleagues. Respondent’s misrepresentations to the bankruptcy court, to his client, to relator during the disciplinary investigation, and to the panel during the hearing compel an actual suspension from the practice of law. His assertion at the hearing that he is “proud” of his “aggressive” work on Ragland’s behalf shows his lack of integrity. The one mitigating factor in this case pales in comparison to the many aggravating factors, and an indefinite suspension is appropriate in light of respondent’s dishonesty, his mismanagement of his client trust account, and his attempt to charge an excessive fee to his client.

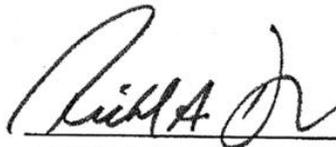
{¶74} However in spite of the above-cited instructions, the panel believes that the fact

Respondent has never previously been disciplined weighs against the imposition of an indefinite suspension. Therefore, after reviewing and consideration all of the exhibits, the testimony, and relevant case law, the panel concludes that Respondent should be sanctioned with a two-year suspension from the practice of law, with six months stayed provided that he has no further violations. Furthermore, all costs of these proceedings should be taxed to the Respondent.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on June 3, 2016. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Kenneth Ronald Donchatz, be suspended from the practice of law in Ohio for two years, with six months stayed on the condition that Respondent engages in no further misconduct, and ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing findings of fact, conclusions of law, and recommendation as those of the Board.



RICHARD A. DOVE, Director